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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 KENYA THOMAS, TYANA MILLER,

4 Plaintiffs,

5 v.

17 Civ. 8593 (JPO)

6 CITY OF NEW YORK, *et al*,

7 Defendants.

Trial

8
9 New York, N.Y.
September 6, 2022
10:00 a.m.

10 Before:

11 HON. J. PAUL OETKEN,

12 District Judge

13 APPEARANCES

14 LAW OFFICE OF ALEXIS G. PADILLA

15 Attorneys for Plaintiffs

16 BY: ALEXIS G. PADILLA

-AND-

17 LAW OFFICE OF DAVID A. ZELMAN

BY: DAVID A. ZELMAN

18 NEW YORK CITY LAW DEPARTMENT

19 Attorneys for Defendants

20 BY: CHRISTOPHER G. ARKO

GREGORY J. O. ACCARINO

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(In open court)

THE DEPUTY CLERK: In the matter of Tyana Miller and
Kenya Thomas v. the City of New York.

MR. ZELMAN: Good morning. David Zelman for the
plaintiff.

THE COURT: Good morning.

MR. PADILLA: Alexis Padilla for the plaintiffs Tyana
Miller and Kenya Thomas.

THE COURT: Good morning.

MR. ARKO: Good morning. Christopher Arko, New York
City Law Department for defendant Bridget Penner and Andrew
Kamna.

MR. ACCARINO: And Gregory Accarino, assistant
corporation counsel.

THE COURT: As of today, masks are no longer required
in the public areas of the courthouse. You can take your masks
off if you want. If you wish to keep your masks on, you may.
But, this will be the first trial in two and a half years where
the jury will not have to wear masks during the trial, during
voir dire and the trial. It's up to the judges from today
going forward to decide whether they are going to require
people in the public spaces, their own courtrooms, to wear
masks or not. I'm not going to require masks, but people are
welcome to wear masks if they want. But the jury will be able
to take off their masks.

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1 So we're here today for jury selection and trial in
2 this case which has been adjourned multiple times, and I
3 understand from Mr. Hampton that he received an e-mail from
4 Mr. Zelman and then from Mr. Arko about Ms. Miller.

5 MR. ZELMAN: Yes, your Honor. Just want to first
6 start off by saying, I was very happy to hear about the masks.
7 I only learned about this secondhand, so I am going to let
8 Mr. Padilla address this issue.

9 THE COURT: Can you do me a favor and pull the mic
10 close.

11 MR. PADILLA: Sure. I'm in contact with my client
12 right now. She is at Brooklyn Hospital Center, downtown
13 Brooklyn. She is momentarily going to have a tooth removed
14 from her mouth.

15 I spoke with her twice this weekend in preparing for
16 trial. Both times she mentioned to me she suffered from a
17 toothache. She didn't say anything about having to go to the
18 hospital for it, but she mentioned it to me.

19 She called me last night late after I already gone to
20 bed, I saw the missed call this morning, and this morning she
21 texted me to say she'd gone into the hospital to have the tooth
22 removed. She just texted me, I was actually in the process of
23 sending to the Court a photo of the intake document from
24 Brooklyn Hospital that is dated 9/6 at 5:43 a.m.

25 THE COURT: It's Brooklyn Hospital?

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1 MR. PADILLA: She's at Brooklyn Hospital. And it
2 appears she is going to have a tooth removed.

3 So, what we are asking for is a 24-hour adjournment so
4 that she can be here and in proper condition to testify. I was
5 planning on having her testify today. I don't feel comfortable
6 having her testify. I am assuming she is going to be given
7 anesthesia of some sort before this tooth is removed. I'm not
8 sure what level, what condition she is going to be in when she
9 comes out of the procedure in terms of being able to speak
10 clearly to the jury, or even to just sit for the time that it
11 will take to go through her direct examination.

12 If the Court were inclined to do jury selection today,
13 I would not object to doing that without her. But, I don't see
14 how we can move forward with her as a witness today where she's
15 had anesthesia and she's had to sit for this procedure. I just
16 think she needs 24 hours if the Court is willing.

17 THE COURT: Okay. What if we did jury selection and
18 openings today, and then start with witnesses tomorrow?

19 MR. PADILLA: I would like to have her present for my
20 opening if possible. Obviously she doesn't need to be here for
21 it, but I would like for the jury to see her, know who I'm
22 talking about, and for her to hear it, what the openings are.

23 THE COURT: Okay. Mr. Zelman, anything you want to
24 add?

25 MR. ZELMAN: No, your Honor.

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1 THE COURT: Mr. Arko.

2 MR. ARKO: Your Honor, we do object to any
3 postponement of the trial. There is no reason why we can't
4 pick a jury today, do opening statements, and even call any one
5 of the other four parties there are in this case. This has
6 been adjourned for 13 months.

7 So, I think we should do as much as we can today to
8 get as far as along as we can, so we are not wasting time. We
9 spent the entire weekend preparing for trial. It should be
10 over by Thursday. I strongly would urge the Court to do as
11 much as we can today, jury selection, opening statements, and
12 at least one of the witnesses we can get called today.

13 If Mr. Padilla is concerned about his client not being
14 here, certainly the Court can give some explanation that she is
15 not here because of an emergency through no fault of her own
16 and the jury should not draw any conclusions from the fact she
17 is not at the table today. I think that would address any
18 concerns there may be and we can get as much done today as
19 possible without wasting any time.

20 THE COURT: Do you want to add anything?

21 MR. PADILLA: Just I feel my client has a right to
22 participate in a trial, to be here, to be present, to see
23 what's going on. She's not absent through any fault of her
24 own. This wasn't something that she could have avoided or
25 planned for ahead of time. Things happen.

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1 MR. ZELMAN: I would just add, your Honor, I think
2 even the plaintiffs are more anxious to proceed with the case
3 than defense counsel. We have also had this case adjourned
4 many times. And we are in the same position as them as far as
5 desire to move forward with the case. It is just a question of
6 weighing the equities here, about what your Honor feels is the
7 best thing to do.

8 THE COURT: If we started witnesses, first of all,
9 let's go back. Openings. How long do you expect for openings?
10 Are you going to do the opening?

11 MR. PADILLA: I am.

12 THE COURT: For both plaintiffs?

13 MR. PADILLA: Brief, very brief.

14 THE COURT: How long do you think?

15 MR. PADILLA: Less than 10 minutes.

16 THE COURT: Defense openings?

17 MR. ACCARINO: Yes, your Honor. Between 10 and 15
18 minutes.

19 THE COURT: So that's not a long time. Then once we
20 start witnesses, I am assuming we are going to have two
21 witnesses for the plaintiffs and two for the defendant. Is
22 that right?

23 MR. ZELMAN: I think so.

24 MR. ARKO: My understanding that the plaintiffs are
25 going to call the defendants. So in that case, we have the two

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1 defendants and one custodian of records in total that we need
2 to at least have testify to present our case, whether they're
3 called on plaintiffs' case or not.

4 THE COURT: You won't need to recall the defendants.

5 MR. ARKO: I don't expect to, no.

6 THE COURT: What's your best estimate of, once the
7 testimony starts, what do you think? One day, two days?

8 MR. PADILLA: I see the afternoon today, if Ms. Miller
9 were here, I would say we get through all four witnesses for
10 plaintiff in the afternoon and the morning. So today and
11 tomorrow morning.

12 THE COURT: All four witnesses?

13 MR. PADILLA: I would say more likely, yeah.

14 MR. ZELMAN: One other point I'd like to raise. We
15 asked to introduce Ms. Thomas' medical records. Defendants
16 object. I don't know there was ever a ruling specifically on
17 that, although maybe we touched upon it. But we have the
18 records, defense counsel requested the records from her doctor.
19 They are on our exhibit list. And I'm raising this point only
20 because if your Honor has -- I think we had a discussion about
21 it. There is really no genuine concern about authenticity of
22 these records. However, I don't remember any specific rulings.
23 So there is a possibility of having to call a representative
24 from the doctor's office for Ms. Thomas' doctor, if the
25 authenticity of these records is not admitted.

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1 THE COURT: You are not talking about the hospital
2 records?

3 MR. ZELMAN: No.

4 THE COURT: You are talking about --

5 MR. ZELMAN: Medical records from a known doctor by
6 Ms. Thomas here.

7 THE COURT: I don't remember that coming up in the
8 motions in limine.

9 MR. ZELMAN: Right. So we did it on the JPTO, they
10 objected on the JPTO. But I think that there was a brief
11 discussion about whether or not the defense counsel really
12 objected to the authenticity of it, and then it was not
13 specifically ruled upon. So...

14 THE COURT: What's the purpose of the medical records?

15 MR. ZELMAN: The medical records demonstrate that
16 Ms. Thomas was concerned about what happened on that night,
17 2017. She did treat with her doctor for it. She also was
18 complaining about heart palpitations, she was complaining about
19 when she saw officers, she was getting very anxious. So she
20 went to the doctor, there's medical records to show she went to
21 the doctor. It is like six or seven pages from the doctor.

22 We provided authorization for those records, defense
23 counsel were able to obtain those records from the doctor's
24 office as I understand it, and then proceeded to object to
25 those records on the JPTO.

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1 THE COURT: Mr. Arko.

2 MR. ARKO: We did not receive the medical records from
3 Dr. Gold. We got -- I went back and reviewed the file. We
4 attempted to get them from her, but her office wouldn't release
5 them without our paying for them first, and she couldn't fill
6 out a tax form that our fiscal office needed to obtain them.
7 So we were never able to get them directly from her.

8 At some point in discovery, Mr. Zelman produced to us
9 uncertified records that he says are from Dr. Gold. There is
10 no certification, we did not get them directly from her office.
11 We don't have any context as to where they came from. We don't
12 know what attachments may be missing from them.

13 We don't consent to them coming in without some
14 authentication. We made that objection on the JPTO.

15 We are calling a custodian of records we gave notice
16 of to authenticate the letter from Woodhull Hospital that there
17 are no medical records for Tyana Miller. Couldn't reach a
18 stipulation about that, so we have a live witness coming in to
19 do that. And we are not going to stipulate to these medical
20 records which are not certified, we did not get from the health
21 care provider directly coming in, and there was no witness that
22 plaintiff gave notice of in the JPTO to authenticate them. We
23 had objections on both hearsay and authenticity grounds, and
24 they haven't given any notice that they wanted to call
25 witnesses.

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1 THE COURT: So you want to call a witness?

2 MR. ZELMAN: Well, do we want to call a witness? No.

3 But, I just would like to add, your Honor, that this is the
4 first time I'm hearing from defense counsel he had any trouble
5 getting these records from Dr. Gold. Dr. Gold has an
6 established practice. I didn't have to fill out any tax forms.
7 I have no idea what he is talking about. It's paying the
8 amount of money for seven pages, they send the records.

9 I always provide defense counsel as a courtesy copy
10 with a copy, but I never heard once from them that I can recall
11 that they were having any trouble getting this from Dr. Gold
12 herself. And I think this just trial by sabotage. There is
13 really no genuine concern about authenticity, but, if again, we
14 would, I would be in a pickle so to speak if I had to call
15 Dr. Gold's office to ask her to bring a representative to say,
16 okay, this is Kenya Thomas' medical records from her visits
17 here. It is a foregone conclusion.

18 Maybe, your Honor, if your Honor would prefer to go
19 that way, maybe we can do it via telephone, to save them the
20 trouble of having to come here to authenticate the records.
21 But, again, I think this is just literally a trial by ambush,
22 the fact that defense counsel never raised this issue.

23 THE COURT: They objected in the JPTO, so you all
24 could have talked about this.

25 MR. ARKO: If I may just say, I know Lucienne Pierre

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1 e-mailed Mr. Zelman about this issue, and I believe it was
2 discussed in the July 2, 2019 post-discovery conference. I
3 have the transcript of it. This is not something Mr. Zelman
4 didn't know about.

5 THE COURT: Unless you can show me these are
6 self-authenticating under the rules, you will need to call
7 somebody to authenticate since they don't agree. Those are the
8 rules. You can't have a witness by phone. I can probably let
9 you bring in a witness.

10 MR. ZELMAN: Could it be done by Zoom?

11 THE COURT: No.

12 That's all going back to the scheduling issues I raise
13 to say there might be another witness for a very brief period
14 of time.

15 Still, it seems to me that we could put off openings
16 to tomorrow, or at least we can sort of wait and see how long
17 jury selection takes today.

18 Why don't we go forward with jury selection and see
19 where we are, and get an update from Ms. Miller on where things
20 are.

21 I do need some authentication.

22 MR. PADILLA: I sent the intake document to
23 Mr. Hampton as well as to Mr. Arko.

24 THE COURT: Thank you. So, we'll go forward with jury
25 selection this morning, since it sounds like everyone is all

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1 right with that. You received my order hopefully on Friday
2 about how I am going to characterize what's in and out of the
3 case. That should be fairly straightforward. If anyone has
4 any objections to it, you can put them on the record now.

5 MR. ARKO: Only one word on that we would like to
6 address with the Court. I just need to flip to it.

7 MR. ZELMAN: If I may ask what are you referring to
8 here?

9 THE COURT: The order I put out on Friday saying this
10 is what I intend to read to the jury.

11 MR. ZELMAN: Right.

12 THE COURT: We've been talking about as a stipulation.
13 Since there is no stipulation, it is my description of what is
14 not in issue and what is in issue in the trial.

15 MR. PADILLA: For plaintiff I have no objection to
16 what I read on ECF assuming the Court will read that verbatim.

17 THE COURT: Yes, unless they want me to change
18 something.

19 MR. ARKO: The only thing we would like to address is
20 the word "briefly." The stipulation reads, "the search warrant
21 carried with it the lawful authority to briefly detain any
22 person found inside the apartment."

23 We would ask the word "briefly" be taken out. My
24 understanding is there is no time limitation on how long the
25 officers can detain somebody while conducting a search. There

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1 is no false arrest claim or unlawful detention claim here, and
2 I want to make sure there is no speculation or suggestion to
3 the jury that these plaintiffs should have been released from
4 handcuffs or allowed to freely walk about the apartment after
5 they had been briefly detained in the search. That's the only
6 concern we have there.

7 THE COURT: Well, it is a fair point. "Briefly" is an
8 indeterminate word anyway. Maybe it's more accurate to say
9 "may be detained for a reasonable period of time sufficient to
10 complete the search" or something like that.

11 MR. ARKO: We would have no objection to that.

12 MR. ZELMAN: Judge, how about just a reasonable period
13 of time?

14 THE COURT: How about a reasonable period of time?

15 MR. ARKO: No objection to that.

16 THE COURT: We'll go with that. You said you are okay
17 with that, Mr. Padilla?

18 MR. PADILLA: Yes, your Honor.

19 THE COURT: Great. We'll go with that. I want to
20 make sure I am saying your name right. Padilla?

21 MR. PADILLA: Yes, your Honor. Thank you.

22 THE COURT: I also read the parties' submissions about
23 strip search, which is an interesting and tricky legal issue
24 and I spent some time reading about a bunch of cases on it, and
25 I read the parties' letters.

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1 There are a bunch of cases that do characterize a
2 strip search as the way defendants do, the ones they cite,
3 saying a strip search is when an officer directs someone to
4 remove their clothes. But there are also a line of cases that
5 refer to it, as Mr. Zelman's cases exemplify, where a strip
6 search is searching someone when they're naked. So, it's
7 extremely hard to find cases in this scenario where someone is
8 already alleged to be in the nude and is allegedly searched in
9 the nude. The way I read the cases, I think if someone -- and
10 there is a bunch of cases. I won't cite them. But there are
11 actually cases including the Supreme Court's decision in
12 *Florence v. Board of Chosen Freeholders* that talk about the
13 ambiguity of the term strip search. And there are cases like
14 the *Kelsey* case in the Second Circuit saying briefly or
15 incidentally seeing someone naked during a clothing exchange is
16 not a strip search.

17 The way I rationalize the cases, if someone is already
18 naked and a search is being conducted, there is a reasonable
19 period of time when someone, when an officer can detain the
20 person to ensure that a search is conducted. But if someone is
21 required to be naked during that detention for what is longer
22 than a reasonable period of time for valid law enforcement
23 purposes, like officer safety, then it becomes an unreasonable
24 search, and I think at that point it becomes a strip search.

25 So I think there are circumstances where someone is

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1 detained and is already naked and is required to stay naked for
2 longer than a reasonable period of time, it does become a strip
3 search. So I won't preclude plaintiffs from using the phrase
4 strip search, and then we'll see how the testimony comes out.

5 MR. PADILLA: I'm sorry. May I interrupt? May I have
6 permission to inform my client that she doesn't need to come in
7 once her procedure is done?

8 THE COURT: Well, it depends. If she's feeling great,
9 she should probably come in.

10 MR. PADILLA: I doubt she will be feeling great as
11 she's getting her tooth pulled.

12 THE COURT: She's definitely getting her tooth pulled?

13 MR. PADILLA: Her last text to me is as soon as she's
14 done, she is going to get in a cab and come here. What I'd
15 like to tell her is don't worry, go home, rest, come back
16 tomorrow.

17 THE COURT: But can you confirm that she actually got
18 the tooth pulled as opposed to something else? What if she
19 goes in and they say, oh, you're fine.

20 MR. PADILLA: Sure.

21 THE COURT: I don't want to close off the possibility,
22 unless she's actually under anesthesia or something and isn't
23 feeling well, if she is able to go forward, we should go
24 forward.

25 MR. PADILLA: Right. But I don't think she realizes

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1 how she'll feel when she comes out after being anesthetized and
2 having a tooth pulled. My concern is she won't be clear in her
3 enunciation when she testifies. Her mouth will be swollen.

4 THE COURT: Have you confirmed she will be
5 anesthetized?

6 MR. PADILLA: I haven't. I am assuming that because
7 she is having a tooth pulled. But her last text to me was, in
8 her words, "they going to numb it." They're going to numb it.
9 So she's confirming to me she is going to be put under
10 anesthesia.

11 THE COURT: It could be Novocaine. That wears off in
12 a hour or two.

13 It depends. If it turns out to be a minor thing and
14 she is feeling better and the Novocaine has worn off, she
15 should come in. Then you could do your openings.

16 MR. PADILLA: Of course. Okay.

17 THE COURT: If she is really feeling badly, then I'm
18 not going to be a jerk about it.

19 MR. ZELMAN: On that strip search issue, I understand
20 your Honor's ruling and I just would point out that I think if
21 police officers decide to search someone who is naked, that
22 that already at the commencement of it is a strip search
23 because they're naked in the first place. If you think about
24 it, the purpose of a strip search is to remove the clothing so
25 the officers can see that person naked. So, if the officers

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1 see someone's naked and then decide to search them, that
2 decision, right there in that commencement of the search, I
3 would argue is a strip search right then and there.

4 I understand your Honor's ruling, I understand the
5 case law that you cited, and I wanted to state that's our
6 position, that this was a strip search as soon as it was
7 commenced because of the lack of attire that the plaintiffs
8 were wearing.

9 THE COURT: I understand that. But, the case law also
10 makes clear an incidental observation of someone who is naked
11 is not a strip search. And in a situation where officers have
12 a search warrant, they have the right to come in and they have
13 the right to detain people during the search. If they say "get
14 out of bed" and the person gets up and they're naked at that
15 moment, it's not a strip search. At that moment it is an
16 incidental viewing of a nude person. If they make them stay
17 naked for a longer period of time than is reasonable for them
18 to serve the purposes of searching the apartment and for
19 officer safety, then it becomes a strip search. That's
20 essentially what I am saying.

21 But I understand you take issue to the extent you've
22 indicated, and that is preserved.

23 MR. ZELMAN: Thank you, your Honor.

24 THE COURT: Anything else before we start with jury
25 selection?

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1 MR. PADILLA: Just a question about jury selection.
2 We are going to put 14 in the box?

3 THE COURT: Yes.

4 MR. PADILLA: So all 14 will be in the box. And then
5 the remainder will be in the audience?

6 THE COURT: Yes.

7 MR. PADILLA: Okay.

8 MR. ZELMAN: I had a question. I think the defense
9 counsel requested something along lines in his letter about
10 saying something to the jury about if they believe -- they tend
11 to believe somebody who has been alleging a sexual assault or
12 words to that effect.

13 I don't think your Honor ruled on that if I'm not
14 mistaken, but our position is that's unnecessary to address to
15 the jury.

16 THE COURT: Right. So, I've tried to capture all the
17 questions that the parties proposed, including that one, in as
18 neutral a way as I can that still gets an affirmative answer if
19 I need to follow up. Here's how I've worded it.

20 "There may be testimony in this trial about alleged
21 inappropriate touching, including sexually explicit testimony.
22 Is there anything about such testimony that would affect your
23 ability to be fair and impartial?"

24 MR. ZELMAN: Judge, can we remove "sexually explicit"?
25 I don't think that's -- that's the allegation in this case and

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1 I don't think that's --

2 THE COURT: I think it is, because there are, well, at
3 least based on the summary judgment record, there could be
4 testimony about specific genital touching. That's what we need
5 to get at.

6 MR. ZELMAN: We are not, you know, I think it's
7 important to know we are not really claiming that Ms. Penner
8 did this for her own gratification. That's not the allegation
9 in the case. The allegation in the case is that the search is
10 excessive and unreasonable.

11 THE COURT: That's why I didn't say sexual assault or
12 anything like that. I said testimony that may be sexually
13 explicit, that is talking about genitals, and some people might
14 have a reaction to that which I'll follow up on.

15 MR. ZELMAN: Can we just say genitals? Instead of --
16 can we just rephrase it, inappropriate touching of someone's
17 genitals?

18 THE COURT: Mr. Arko?

19 MR. ARKO: I'd ask the stipulation be read as your
20 Honor has drafted it with no change be made. I think our major
21 concern here is whether plaintiff alleges for sexual
22 gratification or not, we need to know if there is someone who
23 maybe was a victim of a prior sexual assault or may have some
24 experience with that. And if they don't know that going into
25 it is going to shut down and suddenly not be able to be fair

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1 and impartial, not participate in the jury. If it's not
2 explicitly told to them it is going to involve allegations that
3 are sexual in nature, how can we convey to the jury and make
4 sure we are getting people who are aren't going to be adversely
5 affected by that.

6 I don't think the reason behind why the plaintiffs
7 allege Detective Penner did this makes it non-sexual in any
8 way.

9 THE COURT: I agree with Mr. Arko. At least according
10 to the summary judgment record, there is digital penetration.
11 That is sexually explicit and I think I need to flag that for
12 the jury.

13 So I am going to especially keep it as it is. But I
14 think everything else will be pretty clear and will capture
15 what you all have asked for. So we'll have questionnaires
16 handed out to them so they can follow along, not to turn in.

17 MR. ZELMAN: Can you read the way you intend to --

18 THE COURT: "There may be testimony in this trial
19 about alleged inappropriate touching, including sexually
20 explicit testimony. Is there anything about such testimony
21 that would affect your ability to be fair and impartial?"

22 MR. ZELMAN: Okay. Thank you.

23 THE COURT: Thanks. Anything else anybody wanted to
24 address before we bring over the jury?

25 MR. ARKO: Nothing from defendant, your Honor.

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1 MR. PADILLA: Nothing from plaintiff.

2 THE COURT: What's our ETA?

3 We should be getting the members of the venire in
4 about five minutes. So, I'll explain everything, I'll do an
5 introductory remark. Thank you for being here. And then start
6 the questioning with Juror No. 1 who will be the one closest to
7 me.

8 MR. ARKO: Can we take a bathroom break?

9 THE COURT: I'm planning to do that.

10 MR. ARKO: I should also just inform the Court,
11 sitting in the gallery is Rachel Seligman, she is our
12 supervisor.

13 THE COURT: Ms. Seligman. It might be easier if you
14 move to that side.

15 We'll resume in about five minutes.

16 (Jury selection off the record)

17 (Adjourned to September 7, 2022, at 9:30 a.m.)
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